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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,
PETITIONER,

v.

STEVE CONRAD, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the district court is reported at 341 F. Supp. 465 (E.D. Tenn. 1972) and appears in the petition for certiorari at pages 28-55. The original opinion of the court of appeals and the opinion of the court denying rehearing are reported at 486 F.2d 894, and they appear in the petition for certiorari at pages 56 and 69, respectively.

Jurisdiction

The judgment of the court of appeals was entered on May 30, 1973. A timely petition for rehearing and suggestion of rehearing *en banc* was filed and was denied by the court on October 30, 1973. This petition for a writ of certiorari was filed on December 26, 1973, and it was granted by order entered on February 19, 1974. Jurisdiction is invoked under 28 U.S.C. § 1254.

Questions Presented

1. In denying petitioner permission to produce HAIR in the Chattanooga Municipal Theater because of its contents did respondents violate the first and fourteenth amendments to the constitution of the United States by utilizing constitutionally impermissible criteria under an ordinance which was wholly lacking in criteria and which did not require respondents to seek judicial review?
2. Did the courts below apply impermissible criteria in concluding that HAIR was obscene?
3. Does the record support a finding that HAIR is obscene?

Constitutional Provisions Involved

The first and fourteenth amendments to the Constitution of the United States.

Statement of the Case

A. *Introduction.*

HAIR is a musical which deals with the life styles of many young people and their attitudes on the Vietnam war, racism, sex, drugs, pollution, etc. Kevin Kelly, writing

in the *Boston Globe* (March 6, 1970) summarizes the play as follows:

> Now the perplexing problem about "Hair" is the apparent way it has been misunderstood by some in our midst. It has been cat-called as foul, crude, obscene, degenerate, lewd, sacrilegious, despicable and anti-American. In its savagely smiling attack on everything (except love and kindness and sharing), it has appalled some persons who confuse "Hair's" deliberately rude manner with its brotherly message. What the musical intends, and what it brilliantly achieves, is an onslaught to shake us into an awareness of the real obscenities around us. The real obscenities are war, confinement of the mind, prejudice, imprisonment of the spirit, pollution, slaughter and social injustice. And, in its own beguiling innocence, "Hair" suggests that some of the world's obscenities can be eliminated if we "let the sunshine in," if we learn but to love one another. ...
>
> Some scenes are completely sung, others are spoken in ordinary raffish street dialogue, and from the overall pattern emerges a kind of capsule history of the hippies, the alienated young struggling against the Establishment, and protesting all the way.
>
> The non-book plot is far less important than the philosophy at its core. Briefly, it centers on Claude Hopper Bukowski, who is about to be drafted, and his best friend George Berger, who has been thrown out of high school. Together, in the company of their long-haired, open-minded, free-soul friends they wander the streets in a wilful odyssey of love. They've been tricked by false values and empty goals, yet they have a belief in the perfectability of the future. They have fierce and funny confrontations with par-

ents, police, politicians, with staid religious attitudes, with self-righteous moralizing and they reach out for something more, something less hypocritical in an age where annihilation is a megaton away.

When I say they reach out, I mean it literally. They reach across the stage to the audience, as though the yearning touch of their hands would help us all, would bridge us to a human contact we have, perhaps, forgotten. They tell us about our world and are willing to ridicule themselves, along with a number of sacred cows, in the process. They hoot at Richard Nixon, Abraham Lincoln, General Custer, Jim Brown, Timothy Leary. They express love for Mick Jagger and parody The Supremes right into the funhouse. And they lead us down the dark dreams of drugs, willing to show us other worlds, and, sure, some of their thoughts are questionable. But the spirit behind them is not. Even in their sudden sorrow, the senseless death of Claude in Vietnam, there is still an exuberant conviction, an unflagging faith in tomorrow and an indefatigable belief in improving the world.

The Galt MacDermott score, with lyrics by Ragni and Rado, is a rock classic. . . . (pp. 15-16)

HAIR has received widespread critical acclaim[1] and is one of the most popular box office attractions in the history of American theatre (App. p. 107). HAIR began its run in New York City in 1967; soon thereafter it began performing in the other major cities in the United

[1] For example, in a "second look" Clive Barnes of the New York Times (*New York Times*, February 12, 1969) concluded his review with, "If you have just one show to see on Broadway try to make it this one." Sydney Harris writing in the *Chicago Daily News* (October 23, 1969) described HAIR as "an extraordinary compelling evening."

States and the world. It has been produced in 140 American cities and in fourteen cities throughout the remainder of the world.

In the past few years, HAIR's road companies began to show in various smaller cities and towns throughout the southeastern and southwestern parts of the United States. Frequently HAIR sought access to municipal facilities because in these communities they are the only or the best available places for performance. Despite the fact that these facilities had *without exception* routinely been made available for plays, some municipal auditorium and theatre managers, supported by city officials, claimed an unfettered right to determine which plays will be permitted to show and which will not. And time and time again HAIR's content—its "anti-establishment" views—collided with the different prepossessions of these municipal officials.

At petitioner's[2] request federal district courts have issued injunctions against municipal officials on the ground that their assertion of unfettered censorial discretion is wholly inconsistent with the constitutional guarantee of free speech secured by the fourteenth amendment.[3] The few district courts which denied relief were reversed on appeal. *Southeastern Promotions, Ltd.* v. *City of West Palm Beach*, 457 F.2d 1016 (5 Cir. 1972); *Southeastern Promotions, Ltd.* v. *Oklahoma City, Okla.*, 459 F.2d 282 (10 Cir. 1972); see also *Southeastern Promotions, Ltd.* v. *City of Mobile, Ala.*, 457 F.2d 340 (5 Cir. 1972).

[2] Petitioner is the promoter of HAIR, that is, it has a contract arrangement with the New Hair Company, the owner of the play, to produce the play.

[3] Some of the district court cases are collected in *Southeastern Promotions, Ltd.* v. *City of Mobile*, 457 F.2d 340, 341 (5 Cir. 1972).

B. *Proceedings in the District Court.*

This case began in "routine" fashion. Petitioner was refused access to the municipal theatre (the "Tivoli" Theater") and it brought an action in the appropriate district court. *Southeastern Promotions, Ltd.* v. *Conrad,* (Pet. pp. 28-55; 341 F. Supp. 465). Like their counterparts elsewhere, these respondents asserted a series of paper-thin defenses which have been uniformly unsuccessful, and which were rejected in the court below. (Pet. pp. 31-35; 341 F. Supp. at 468-71.) The heart of the defense, however, was the same claim unequivocally rejected by the Fifth and Tenth Circuits: respondents asserted, just as did the municipal officials in *Mobile, West Palm Beach* and *Oklahoma City,* that they had an essentially unfettered right to determine what plays would be exhibited and what would not. And they rejected HAIR because, in their unexplained opinion, HAIR's exhibition was neither "in the best interest of the community" nor "clean and healthful and culturally uplifting" (pp. 16-17, infra).

The district judge did not squarely focus on the standards used by respondents because *at the hearing* in the district court respondents asserted for the first time that HAIR was obscene, and accordingly, it could not be exhibited. In a most unusual response, the judge empaneled an advisory jury which heard evidence and (without seeing the play) returned a verdict of obscenity. (Pet. p. 37; 341 F. Supp. at 472.) The judge agreed with this result. *Without seeing the play,* he made findings of fact and concluded that HAIR was obscene. (Pet. pp. 38-48; 341 F. Supp. at 472-77.) In so doing, the judge recognized that HAIR had been performed in 140 cities throughout the United States and had been found by four other federal courts not to be obscene. (Pet. p. 41; 341 F. Supp. at 474.) The judge's ruling (Pet. pp. 42-47; 341 F. Supp.

at 475-76) rests entirely on his attempt to carve a play into speech and *two* levels of "conduct"—that which is "illustrative" of the speech and that which is not—and to treat the latter "conduct" as wholly beyond the protection of the free speech guarantee.

C. *The Proceedings in the Court of Appeals.*

On appeal, the Sixth Circuit, over the dissent of Judge McCree, affirmed. Judge O'Sullivan and Judge Weick each wrote opinions for the majority. Judge O'Sullivan's opinion (Pet. pp. 56-64; 486 F.2d at 894-98) simply adopts the reasoning of the district court, and then contains a holding that HAIR's speech itself is obscene (Pet. p. 62; 486 F.2d at 897). His opinion does not address a single argument raised by petitioner, nor does it contain a single citation in support of his holding. Judge Weick's concurring opinion describes HAIR—a play neither he nor Judge O'Sullivan has ever seen—as one which "involves only depraved sexual action" (Pet. p. 65; 486 F.2d at 899). Judge Weick so characterized a play which has been viewed by millions of theatregoers in New York, Los Angeles, Chicago, San Francisco, Seattle, Las Vegas, Boston, Memphis and Nashville, not to mention citizens in virtually every major capital of the western world as well as Tokyo, Sydney, and Tel Aviv.

A petition for rehearing and suggestion of rehearing *en banc* were filed. On October 30, 1973, the suggestion for *en banc* consideration was denied, Judge Edwards and Judge McCree dissenting. (Pet. p. 69; 486 F.2d at 900.) The petition for rehearing was then denied by the original panel, Judge McCree once again dissenting. (Pet. pp. 74-76; 486 F.2d at 901.) In his dissent (Pet. pp. 74-76, 486 F.2d at 903-904), Judge Edwards argued that the panel's decision was inconsistent with the standards set down by

this Court in *Miller* v. *California*, 413 U.S. 15, and that respondents' censorship was brought about under an ordinance wholly lacking in standards and one which did not provide for judicial review. He observed that

> "Unless the Supreme Court grants certiorari, this case will represent a final adjudication that the play "Hair" is obscene and subject to being banned under state obscenity laws in Michigan, Ohio, Kentucky and Tennessee — and this, we repeat, without any board member or judge so holding ever having seen the play. ..."

Judge Weick wrote an opinion for himself and Judge O'Sullivan denying rehearing and now took the ground that it was an appropriate exercise of judicial "discretion" to refuse equitable relief to an "obscene" play. (Pet. p. 70; 486 F.2d at 901-903)

Summary of the Argument

Point I (pp. 13-23, *infra*) demonstrates that the courts below were in error in viewing this as an obscenity case. Respondents regularly make the municipal theatre available for plays, but they do so on the basis of plainly unconstitutional criteria.

It has long been settled that municipal officials may not deny permission for the use of public facilities unless the standards governing the exercise of discretion are related to legitimate municipal ends. *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150-151; *Grayned* v. *City of Rockford*, 408 U.S. 104, 113 n.22. Here the municipal ordinance governing auditorium use contains no standards, and the articulated and applied criteria were that the municipal auditorium was available only for "clean, healthful entertainment which will make for the building of a better

citizenship." On this criteria, respondents rejected HAIR after "brief" discussions of HAIR's "nudity" and its "language." *Respondents made no effort to apply obscenity criteria*—that issue did not arise until the proceedings in the district court. And the criteria actually applied are invalid under a long line of decisions in this Court, as the Fifth and Tenth Circuits recognized on virtually identical facts in *West Palm Beach, Mobile* and *Oklahoma City, supra*, p. 5.

The lower courts thought *Shuttlesworth* inapplicable because, they said, exhibition of HAIR would violate Tennessee prohibitions against obscenity. But the auditorium ordinance is not limited to obscenity. An auditorium ordinance so restricted might be valid, but that is irrelevant here. "It matters not that the words [petitioner] used might have been constitutionally prohibited under a narrowly and precisely drawn statute." *Gooding* v. *Wilson*, 405 U.S. 518, 520; *Lewis* v. *City of New Orleans*, 415 U.S. —, —. Respondents made no effort to determine whether HAIR was obscene when they decided to reject the play.

Moreover, Respondents' conduct is an invalid prior restraint, as *Shuttlesworth* and numerous other decisions make clear. Accordingly, whether exhibit of HAIR might be the basis of a valid criminal prosecution provides no justification for the prior restraint. Nor is Judge Weick correct in arguing that all that is involved here is the court's discretionary refusal to award petitioner declaratory and injunctive relief with respect to an "obscene" play. An unconstitutional licensing provision is void on its face, and in order to challenge such a provision plaintiff is *not* required *first* to prove that its speech is constitutionally protected.

Point II (pp. 24-26) demonstrates that respondents' conduct is invalid under *Freedman* v. *Maryland*, 380 U.S. 51, and its progeny. Here, as in *Freedman*, respondents,

local municipal officials, sought to impose a final restriction upon the exhibition of a play because of its content. *Freedman* makes clear that in such circumstances municipal officials must carry the burden of instituting judicial review. (*Id.* at 58-60.) *Heller* v. *New York*, 413 U.S. 483, 489 n.5. *Freedman* requires a judicial, not an administrative, valuation of free speech claims, and it is not inapplicable, as respondents contend, simply because HAIR might be shown in some private theatres, even on the implausible assumption that private theatres were likely to accept what municipal officials had previously rejected as violative of several state statutes.

Point III (pp. 27-43) demonstrates that the courts below applied patently incorrect standards to evaluate HAIR's obscenity *vel non*. The district judge sought to carve a play into its component speech and conduct, *and* then *further* divide conduct into two levels: conduct which is "illustrative" of the speech and conduct which is not, the latter being wholly beyond the first amendment. While no criteria for distinguishing between the two levels of conduct are set forth, the first category is apparently viewed as a very narrow one. Not only is this complex analysis wholly unworkable in the context of live theatre, it rests upon a fundamental misconception of what *both* the first amendment *and* live theatre are about.

For first amendment purposes each medium must be treated for what it is; each medium must be considered in terms of its own unique problems, not artificially analyzed as though it were something else. *Kingsley International Pictures* v. *Regents*, 360 U.S. 684, 689-90; *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94. In failing to recognize that fact, the courts below committed a basic error. They relied upon an oversimplified and universally criticized distinction between speech and conduct, one which finds no support in

the decisions of this Court. Every form of speech involves some related conduct. The accompanying conduct is within the protection of free speech, and it can be curtailed only if standard first amendment requirements are satisfied; namely, narrowly drawn restrictions designed to vindicate compelling governmental interests. Where the governmental interests are related to sex, obscenity requirements must be satisfied. *Miller* v. *California*, 413 U.S. 15, 27.

In attempting to atomize live theatre into its "elements," the judge plainly misunderstood the nature of live theatre, a form of communication which antedates the first amendment by thousands of years. A play is an inseparable union of words and actions which together serve as a vehicle for conveying ideas. As Judge Edenfield observed, "The nonverbal elements in a theatrical production are the very ones which distinguish this form of art from literature." *Southeastern Promotions, Ltd.* v. *Atlanta*, 334 F. Supp. 634, 639 (N.D. Ga. 1971). A play's "conduct", therefore, is not "separately identifiable conduct which allegedly was intended by [petitioner] to be perceived by others as expressive of particular views but which on its face, does not necessarily convey any message." *Cohen* v. *California*, 403 U.S. 15, 18.

Since each medium presents its own unique problems, it may be that, even if a play is taken as a whole, isolated scenes therein may be so lacking in communicative value and so patently offensive as to constitute hard core pornography. But it is unnecessary to focus on that issue here: first, the judge made no effort to do so, and secondly, the then existing Tennessee obscenity statutes were not narrowly drawn and directed toward that kind of conduct (*Miller* v. *California*, 413 U.S. 15, 25-26) as the state supreme court has recognized. *Art Theatre Guild, Inc.* v. *State*, ___ Tenn. ___ (1974). We would add, however, that in determining what is appropriate in the theatre one

cannot, as did the courts below, assume that the standards of the street govern what is appropriate in the theatre. The context is important, and in live theatre the audience is forewarned and the sexual orientation of the material has dramatic and communicative relevance.

Little discussion need be given to Judge O'Sullivan's unexplained "finding" that HAIR's language alone is obscene. HAIR's language may shock but that hardly makes it obscene. Obscene speech "must be, in some significant way, erotic", *Cohen* v. *California*, 403 U.S. 15, 20; *Miller* v. *California*, 413 U.S. 15, 18-19 n.2. Judge O'Sullivan plainly confuses the problem of obscene speech with so-called "offensive" speech. And here there is no showing that the Tennessee statutes are directed toward offensive speech. Moreover, this speech could not be prohibited under *Cohen*, *supra*, and *Gooding* v. *Wilson*, 405 U.S. 518: the speech takes place not in a public place but in a theatre where it has obvious dramatic relevance. Indeed, if Judge O'Sullivan were correct, live theatre could not depict the manner and expression of a sizable subculture in this society.

Point IV (pp. 43-49) demonstrates that there is no acceptable basis in this record for the conclusion that HAIR is obscene. Respondents rightly concede that the burden of proof on obscenity rests with them. *Blount* v. *Rizzi*, 400 U.S. 410, 17-18; *Healy* v. *James*, 408 U.S. 169, 184. Unless one concludes that it is self-demonstrating from the libretto that HAIR is hard core pornography, then on respondents' evidence alone the courts below should have held for petitioner. Respondents' testimony is extraordinarily weak and there was affirmative evidence that the play violated none, let alone all, of the criteria set out in *Miller* v. *California*, *supra*. Accordingly, the judge should not have disregarded the record evidence in favor of the play absent a conclusion that the libretto was

patently hard core pornography. What is more, the judge committed another error in concluding that the play was obscene without even seeing it and without any indication that it was impracticable to do so.

Argument

POINT I. THERE IS A LACK OF CONSTITUTIONALLY ACCEPTABLE STANDARDS GOVERNING USE OF THE MUNICIPAL AUDITORIUM.

The courts below were fundamentally in error in viewing this as an "obscenity case." This case is no different from those decided by the Fifth and Tenth Circuits in *Mobile*, *West Palm Beach* and *Oklahoma City*, *supra*, p. 5. Here, as in those cases, access to the municipal theatre was refused under a municipal code wholly lacking in standards; and here, as in those cases, municipal officials claimed and exercised unfettered discretion over what plays would be permitted. Respondents' action is, therefore, invalid on its face.

A. *The Necessity For And Lack Of Acceptable Standards.*

This is not a case where petitioner seeks access to a public facility not ordinarily open to the public for the use sought. Respondents permit use of the public auditorium for production of plays.[4] (E.g. App. p. 29) It has long been established that municipal officials may not deny permission for the use of public facilities unless the

[4] This is not a case where the public facility is unavailable for the type of activity (exhibition of a play) here involved. Compare *Lehman* v. *City of Shaker Heights*, 417 U.S. ___. Nor, unlike *Lehman*, is there any problem of a captive audience.

standards governing the exercise of their discretion are permissible under the first and fourteenth amendments. The cases so holding (beginning with *Lovell* v. *City of Griffin*, 303 U.S. 444) are numerous, and many are collected in *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 151 n.2. *Shuttlesworth* is particularly instructive here. Defendant was there convicted for engaging in a march in violation of a local permit ordinance. The ordinance authorized the denial of the permit if the local authorities concluded that "the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." The ordinance was held void because it amounted to a grant of "*extensive authority* to issue or refuse to issue parade permits on the basis of broad criteria *entirely unrelated to legitimate municipal regulation*" (394 U.S. at 153). This Court said:

> There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any "parade," 'procession," or "demonstration" on the city's streets or public ways. For *in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience."* This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional. *"It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official*—as by requiring a permit or license which may be granted or withheld in the discretion of such official—*is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."* (394 U.S. at 150-151).[5]

See also *Cox* v. *Louisiana*, 379 U.S. 536, 557; *Grayned* v. *City of Rockford*, 408 U.S. 104, 113, n.22; *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 99-101; *West Palm Beach*, *supra*, 457 F.2d at 1020-1021. That *Shuttlesworth's* teachings apply to public buildings as well as to public streets is evident, as the Fifth and Tenth Circuits recognized. See, for example, *United States Servicemen's Fund* v. *Shands*, 440 F.2d 44, 46 (4 Cir. 1971) (opinion of Craven, J.); *East Meadow Community Concerts Association* v. *Board of Education*, 19 N.Y.2d 605 (1967); *Danskin* v. *San Diego Unified School District*, 28 Cal.2d 536 (1946). See *Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 129.

The crucial question, therefore, is the sufficiency of the criteria used by respondents to determine which plays shall and which shall not be allowed to make use of the municipal auditorium. We submit that here, as in *Mobile*, *West Palm Beach* and *Oklahoma City*, the constitutional requirement of "narrow, objective and definite standards" is, quite plainly, not met. Respondents make no contention that Section 2-238 of the Code of the City of Chattanooga,[6]

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[5] Emphasis supplied throughout this brief unless otherwise indicated.

[6] Section 2-238 provides:

"The board of directors of the Chattanooga Memorial Auditorium shall have complete control and the entire management of the Chattanooga Memorial Auditorium, and shall make, and by a majority vote of the board shall approve, all contracts pertaining to the maintenance, upkeep, use and operation of the auditorium; provided, that any contract involving liability on the part of the city shall have the approval of the board of commissioners." No. 1735, § 3; Code 1960, § 2-72)

which controls use of the theatre, prescribes any express standards, and accordingly, the courts below rightly made no reference to it. Rather, respondents seek to justify their conduct on a different basis. Respondents' answer (App. p. 18) asserted that to permit exhibition of HAIR

> "would be contrary to [respondents'] standing policy of leasing the premises only for clean, healthful entertainment which will make for the building of a better citizenship."

And respondents' testified to the same effect. The commissioner of utilities, grounds and buildings testified that HAIR was denied access because, "in the best interest of the community," respondents permitted only productions which are "clean and healthful and culturally uplifting."[7] Moreover, respondents' counsel repeatedly stressed

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While apparently not formally introduced as evidence, both parties and the court assumed that this provision had been so introduced and was properly before the court. App. pp. 24-25, and see Tr. Vol. 2, p. 172 where respondent's counsel said: "Your Honor, I believe [this provision has] . . . been stipulated . . ." The relevance of the provision was briefed and argued before the court of appeals on the original hearing and the petition for rehearing.

[7] The testimony (App. p. 25) in material part is as follows:

"Q. Now can you tell us, Commissioner Conrad, does the auditorium board have a policy on what productions are allowed to be presented at the Tivoli Theatre and the Auditorium?

A. There has been, as I understand it, an unwritten policy of longstanding that was taken from the original Auditorium board dedication back in 1924. Basically, since I have been associated with the board, the past four and a half years, this is the first instance where we have denied the use of this particular facility to anyone. We use the general terminology in turning down the request for its use that we felt it was not in the best interest of the community and I can't speak beyond that. That was the board's determination.

Now, I would have to speak for myself, the policy to which I would refer, as I mentioned, basically indicates that we will, as a board, allow those productions which are clean and healthful and culturally uplifting, or words to that effect. They are quoted in the original dedication booklet of the Memorial Auditorium.

Q. Did you bring that dedication booklet with you?

A. Yes, I have it here.

Q. Would you make it an exhibit to your testimony, please?"

their unfettered rights of censorship stemming, he believed, from the "proprietary" character of their activity (App. pp. 110-116).[8]

The record, therefore, demonstrates the following: in refusing petitioner's application, respondents (a) did not see the play, (b) made no effort to apply obscenity criteria, (c) never in fact considered whether HAIR was obscene; (d) discussed "briefly" HAIR's "nudity" and "language";[9] and (e) concluded that exhibition would not be in the "best interest of the public." A brief, intuitively reached decision — and HAIR was barred from access to the municipal theatre.

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[8] Passing *arguendo* the accuracy of the characterization, the distinction, whatever its relevance to the municipal tort liability under state law, has no constitutional significance. The judge, therefore, rightly rejected the argument (Pet. pp. 32-33; 341 F. Supp. at 469-70). Whenever a public body engages in activity which affects private rights it is subject to the consitution of the United States. E.g., *Smith* v. *Gougen*, ___ U.S. ___, ___ (Rehnquist, J., dissenting); *City of West Palm Beach*, *supra*, 457 F.2d at 1019-1020. See also *Oklahoma City*, *supra*, 459 F.2d at 283. Respondents did not pursue this argument in the court of appeals.

[9] "Mr. Conrad testified:

A formal vote was then taken not—to deny the booking. I believe the words used—the nudity was discussed briefly. *It was not an in-depth discussion if I recall. The nudity was discussed briefly. The language was discussed briefly. It was determined that the booking would not be made in the best interest of the public.*

Q. As a matter of fact, your obscenity defense was filed Friday the day before you went?

I had no knowledge of what the defense was. I mean, I hadn't conferred with the attorneys, I didn't know." (App. p. 56)

Assuming that respondents' "standards" formed a part of the ordinance under which they acted,[10] we know of no decision which would remotely sanction such open-ended criteria. It has no more precision than "family entertainment," which the Fifth Circuit found wanting. *City of West Palm Beach, supra.* "Clean and healthful and culturally uplifting" entertainment is the equivalent of "the public welfare, peace, safety, health, decency, good order, morals or convenience," a standard invalidated in *Shuttlesworth.* It is also the equivalent of "prejudicial to the best interests of the people of said City," a standard invalidated in *Gelling* v. *Texas,* 343 U.S. 960, and "moral, educational or amusing and harmless" which was condemned in *Superior Films, Inc.* v. *Department of Education,* 346 U.S. 587. For additional illustrations see *Interstate Circuit* v. *Dallas,* 390 U.S. 676, 682-83. See also *Coates* v. *City of Cincinnati,* 402 U.S. 611, 614. We emphasize here that under the constitution of the United States

> "a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'deceny,' or 'morals' of the community."

Shuttlesworth v. *City of Birmingham,* 394 U.S. 147, 153; see also, *Cox* v. *Louisiana,* 379 U.S. 536, 557. Accordingly, "in numerous . . . cases, [this Court has] condemned

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[10] Under *Shuttlesworth* and *Niemotko* v. *Maryland,* 340 U.S. 268, we think it doubtful that, where free speech interests are at stake, respondents can supply otherwise absent standards *ex post facto* to an ordinance wholly lacking in standards. Here, as in *Shuttlesworth,* respondents *in fact* operated in a free-wheeling manner in accordance with the apparently open-ended discretion conferred upon them. Accordingly, their conduct was unconstitutional. (394 U.S. at 154-159)

broadly worded licensing ordinances which grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences." *Grayned* v. *City of Rockford,* 408 U.S. 104, 113, n.22.

B. *The Lack Of Standards Is Fatal Here.*

We think that the foregoing cases are decisive here. Respondents acted on the basis of criteria wholly unrelated to any legitimate municipal need, and which quite plainly allow for the suppression of expression because the content of what is being said differs from their own prepossessions. The district judge, however, apparently thought that these decisions were inapplicable because exhibition of HAIR would, he said, violate the Tennessee statutes and municipal ordinances relating to indecent exposure, lewdness, public nudity and obscenity. (Pet. pp. 35, 46, 48; 341 F.Supp. at 471, 76, 77.) We shall consider the merits of these matters in point III, *infra.* Here it is simply appropriate to observe two things.

First. There is nothing in the auditorium code or respondents "long standing" gloss thereon which in any way purports to restrict respondents' discretion to the question of obscenity. Perhaps a code so restricted would be valid, but that fact is irrelevant here. For it "matters not that the words [petitioner] used might have been constitutionally prohibited under a narrowly and precisely drawn statute." E.g., *Gooding* v. *Wilson,* 405 U.S. 518, 520; *Lewis* v. *New Orleans,* 415 U.S. —, —; *Parker* v. *Levy,* 417 U.S. —, —. Here the auditorium code contained no explicit standards, and the articulated *and applied* "standards" were public interest and "clean and heathful and culturally uplifting," *not*

obscenity.[11] Quite plainly, such an open-ended grant of authority constitutes, in the language of *Shuttlesworth*, " 'an unconstitutional prior censorship or *prior restraint* upon the enjoyment of [first amendment] freedoms' " (394 U.S. at 151. See also *City of West Palm Beach, supra*, 457 F.2d at 1021). Accordingly, even if these standards are treated as part of the auditorium code, the municipal code is void *on its face*. That petitioner has standing to make this challenge here, has of course, been settled since *Thornhill* v. *Alabama*, 310 U.S. 88, 96-98; see also *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613; *Parker* v. *Levy*, 417 U.S. —, —.

Second. The judge seems to have assumed that if the exhibition might violate *any* criminal statute then prior exhibition can be prohibited. The holding, of course, wholly disregards *Shuttlesworth* and its progeny because it completely ignores the distinction emphasized in *Shuttlesworth* between prior restraint and subsequent punishment. It may very well be that exhibition of a movie or play would give rise to a criminal prosecution under an obscenity statute. It does not follow, however, that *absent narrowly drawn standards* municipal licensing officials can impose restraint *prior* to exhibition. This settled distinction between prior restraint and subsequent punishment lies at the heart of the cases recognizing that an ordinance invalid on its face may be disregarded (see *Shuttlesworth, supra*, 394 U.S. at 151), and it was reaffirmed by this Court

[11] Following the grant of the petition in this case the supreme court of Tennessee invalidated its general obscenity statutes for failure to satisfy the specificity requirements of *Miller* v. *California*, 413 U.S. 15. See *Art Theatre Guild, Inc.* v. *State*, ___ Tenn. ___ (1974), discussed pp. 36-37, *infra*. In response thereto, the Tennessee legislature enacted a new obscenity statute. Chapter 510 of the Public Acts of 1974. Section 6 of that act declares void contracts involving obscene productions. That statute is of no assistance to respondents in this case, of course, *for respondents made no effort to restrict their discretion to obscenity criteria.*

in *United States* v. *New York Times, Inc.*, 403 U.S. 713, where the Court held that an injunction against newspaper publication of the so-called Pentagon Papers was an invalid prior restraint while, at the same time, a majority of the justices apparently recognized that the very conduct might have served as a basis for a subsequent criminal prosecution. Closer still to the mark is *Healy* v. *James*, 408 U.S. 169, 184, where the Court held that fear that a local S.D.S. chapter might violate college rules in the future did not warrant denial of S.D.S. recognition as a campus organization. Lack of recognition meant that S.D.S. was barred from access to college facilities, which, said the Court, was an invalid "form of prior restraint." Accordingly, as the Fifth Circuit expressly recognized in *City of West Palm Beach*,[12] whether or not HAIR could be the subject of a criminal prosecution has no bearing on the validity of defendants' prior restraint on this exhibition. See also *Gooding* v. *Wilson, supra*; *Lewis* v. *New Orleans, supra*. The municipal code under which respondents were acting is invalid on its face. On this ground alone, the judge should have declared that the refusal to issue the permit was unlawful without addressing himself to any other question.

In his concurring opinion denying the petition for rehearing, Judge Weick attempts to reformulate the grounds of the district court by arguing that all that is involved here is the court's discretionary refusal to award petitioners declaratory and injunctive relief with respect to an "obscene" play. (Pet. pp. 71-73; 486 F.2d at 901-02).

[12] "Moreover, we hasten to add that the factual situation in the instant case is much more offensive in a constitutional sense than the circumstances in *Shuttlesworth*. There the petitioner was punished under the terms of an unconstitutional ordinance *after* exercising his right of free speech. In the instant case, the discretion of the defendant Boyes operated as a prior restraint upon the plaintiff's freedom of speech." (457 F.2d at 1021) (Emphasis in original).

We put to one side the confusion in this analysis.[13] Laid bare, Judge Weick's argument is that respondents' unconstitutional conduct can be salvaged by a *subsequent* judicial determination that the particular speech involved is unprotected. That argument is not supported by a single decision of this Court and is wholly at variance with sound first amendment considerations. At least since *Near* v. *Minnesota*, 283 U.S. 697, it has been clear that petitioner need not prove the protected character of its speech as a condition precedent to invoking the rules laid down by this Court governing prior restraint and lack of acceptable standards. We invite the Court's attention to the line of cases beginning with *Lovell* v. *Griffin*, *supra*, p. 13, and collected in *Shuttlesworth*, 394 U.S. at 151 n.2. In not one of those cases was it suggested that a petitioner must prove the protected character of its speech as a condition precedent to objecting to facially invalid licensing provisions. See also the line of cases stemming from *Cohen* v. *California*, 403 U.S. 15, and *Gooding* v. *Wilson*, 405 U.S. 518, permitting facial attacks on state statutes without consideration of the protected character of the particular speech involved. E.g., *Plummer* v. *City of Columbus*, 414 U.S. 2; *Lewis* v. *City of New Orleans*, 415 U.S. —; *Parker* v. *Levy*, 417 U.S. —, —.

[13] The question is one of remedial discretion, according to Judge Weick. Where are the informing principles to be drawn from? Is Judge Weick suggesting that, because HAIR is obscene under *state* law, no federal prospective relief should be given? If so, what is the result when, as here, (pp. 36-37, *infra*), the state supreme court holds its own obscenity laws void? And what, in the context of the assertion of federal substantive rights, is the relevance of state law on the discretionary aspects of federal equitable remedies? Hart & Wechsler, *The Federal Courts and the Federal System*, (2 ed.) 787-800, with which compare *id.*, at 719-34 on federal equitable remedies in the context of state substantive law. Or is Judge Weick saying that no federal prospective relief should be given when the speech is, as a matter of federal law, unprotected?

Objections relating to the facial invalidity of state statutes may, of course, be raised in suits for prospective relief. E.g., *United States* v. *Raines*, 362 U.S. 17, 22-23; *Zwickler* v. *Koota*, 389 U.S. 241, 245; *Law Students Research Council* v. *Wadmond*, 401 U.S. 154; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-613; *Steffel* v. *Thompson*, 415 U.S. —; *Procunier* v. *Martinez*, 416 U.S. —.[14] The availability of prospective relief in free speech cases is a recognition that "where First Amendment rights are involved — questions relating to the structure and timing of [judicial] remedies have been thought crucial to substantive constitutional policies." Hart & Wechsler, *The Federal Court and the Federal System*, (2 ed.) 367, a point elsewhere discussed at length by one of counsel. Monaghan, *First Amendment, "Due Process"*, 83 Harv. L. Rev. 518, 524-26.

Judge Weick's appeal to the district court's "discretion" is, therefore, question begging. Judicial "discretion" must be exercised with an eye toward free speech values, and that was not done here. Judge Weick's view would rob the prior restraint cases of any meaning: there would be no need to consider any subsequent issue if it were initially determined that petitioner's speech was not obscene and, therefore, constitutionally protected. Moreover, Judge Weick's view would encourage illegal conduct by municipal officials by holding out the hope that a judge might subsequently determine that the speech was unprotected.

Respondents' conduct should have been held to be invalid because it was based upon a lack of acceptable standards and constituted an invalid prior restraint.

[14] The same rule applies where other fundamental rights are at stake. E.g., *Kusper* v. *Pontikes*, 414 U.S. 51; *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441.

POINT II. RESPONDENTS' CONDUCT IS INVALID BECAUSE THEY WERE UNDER NO OBLIGATION TO INSTITUTE JUDICIAL REVIEW.

Both courts below failed to recognize that respondents' refusal to permit HAIR access to the municipal auditorium was facially invalid not only for lack of acceptable standards but because it was in flat conflict with *Freedman* v. *Maryland*, 380 U.S. 51. That case involved the constitutionality of a Maryland motion picture censorship statute which required an exhibitor to submit the film to a municipal licensing board prior to its showing. If the board disapproved the film, the burden of instituting judicial review lay with the exhibitor. The statute placed no time limits on either the administrative or the judicial determinations. Accepting the argument that under the statute "judicial review may be too little and too late" (*id.* at 57), a unanimous court invalidated the statute in an opinion by Mr. Justice Brennan. While unwilling to hold that a motion picture exhibitor had an absolute right to exhibit without a prior determination of obscenity, the Court ringed any such procedure with tight safeguards. The Court said:

> [t]he teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. (380 U.S. at 58)

And of critical importance here is the Court's holding that the burden of seeking judicial review is on the city officials and that the statute was void for failure to so provide. (380 U.S. at 58-60) See also *Teitel Films* v. *Cusack*, 390 U.S. 139; *Blount* v. *Rizzi*, 400 U.S. 410, 417: In *Freedman*, "We held that to avoid constitutional infirmity a scheme of administrative censorship must: place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor. . . ." *Heller* v. *New York*, 413 U.S. 483, 489 n.5.

Freedman is not inapplicable, as respondents contend, because HAIR's materials have not been confiscated [15] or because the play might [16] be shown in private theatres. *First*. The asserted distinction wholly ignores the obvious "in terrorem" effect of such a municipal decision on private theatre owners in small communities. They are hardly likely to accept for exhibition what municipal officials have previously rejected because exhibition would be violative of several state statutes! Cf. *Bantam Books* v. *Sullivan*, 372 U.S. 58. *Second*. *Freedman* recognizes that, at least as a preliminary matter, municipal officials may in the ordinary course of their duties be called upon to consider questions which have a direct impact on freedom of speech. But, under the fourteenth amendment, municipal officials cannot assume the role of arbiters of what the public should or should not hear on the basis of impermissible criteria relating to the *content* of speech. Given the informal nature and low visibility of these municipal decisions, there are substantial dangers that censorship of this nature will occur. *Freedman* recognizes this danger, and it requires that there be a judicial, not

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[15] Apparently respondents rely upon language in *Heller* v. *New York*, 413 U.S. 483, 490, where the Court observed that initial seizure under a warrant of *one* copy of a film which was detained as evidence did not violate *Freedman*. But we are dealing here with a *final* administrative (not a judicial) determination that the play could not be shown.

[16] Petitioner here alleged (App. p. 12) that there was no other adequate facility to product HAIR — a fact often true in any smaller community. Respondents' answer, it should be noted, does *not* clearly deny that allegation. (App. p. 20, par. 10) There is no judicial finding on that issue.

an administrative, valuation of first amendment claims before a final restraint can be imposed.

As one of petitioner's counsel here has elsewhere observed: "*Freedman's* preference for judicial evaluation of first amendment claims rests upon the most fundamental considerations—the inherent institutional differences between courts and administrative agencies, no matter how judicial the administrative proceedings may be." Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518, 522-23. Here the municipal licensing officials made a *final* decision on grounds of a play's content; whether the result is a final bar to exhibition in *all* available places in the municipality or only in *some* (municipal buildings) is irrelevant to *Freedman's* policies. In *Blount* v. *Rizzi*, 400 U.S. 410, a unanimous Court applied *Freedman* to hold invalid the administrative censorship scheme created by 39 U.S.C. §§ 4006-07. Those statutes authorized the postmaster general to halt use of the mails for commerce in allegedly obscene material. No suggestion was made that *Freedman* was inapplicable because other modes of transportation were available to petitioner, see *id.* at 416-417; similarly irrelevant is the fact, if it be one, that other places of exhibition might be available to petitioner. Not surprisingly, therefore, the Seventh Circuit has expressly rejected respondents' contention, *Collin* v. *Chicago Park District*, 460 F.2d 746, 756-57, as have other courts implicitly. E.g. *Women Strike for Peace* v. *Morton*, 472 F.2d 1273 (D.C. Cir.).[17]

[17] Respondents faintly asserted in the court of appeals that petitioner did not raise the *Freedman* issue in the district court. There is no record of the various arguments orally made in the district court, and much time was, in fact, spent in obtaining an expedited hearing from the court and on meeting the judge's strong concern with the obscenity issue. But other issues were also raised and considered, and on this record there is no showing that it was *not* raised. The complaint specifically asserts that respondents' conduct was an unconstitutional prior restraint (Complaint, pars. 3, 4; App. pp. 7-8) and, absent compliance with *Freedman* that is plainly so. Moreover, defendants' conduct is under an ordinance which in failing to provide for judicial review is void on its face under *Freedman* and defendants have standing to raise that issue, *Broadrick* v. *Oklahoma*, *supra*. *Freedman* was briefed and argued in the court of appeals and not surprisingly, Judges Edwards and McCree expressly pointed to its violation. (Pet. p. 75; 486 F.2d at 903-904.) While *Freedman* was squarely raised in the petition for certiorari (p. 2), respondents' brief in opposition wholly ignored the point. Finally, the defect of the auditorium code under *Freedman* is so palpable that it could be noticed here for the first time, see *Vachon* v. *New Hampshire*, 414 U.S. 478, 479, and see the cases collected in the dissenting opinion in *Mayor of the City of Philadelphia* v. *Educational Equality League*, ___ U.S. ___. Thus, it is unnecessary to consider whether the issue is also properly here under *Hormel* v. *Helvering*, 312 U.S. 552, 556-57, and *Anderson* v. *United States*, 416 U.S. ___, ___ n.5 and n.12.

POINT III. THE COURTS BELOW APPLIED AN INCORRECT STANDARD TO EVALUATE THE PLAY.

While the judge quoted and made reference to other Tennessee criminal statutes bearing on sexual conduct such as public nudity and lewdness (Pet. p. 36; 341 F. Supp. at 471), the judge and the court of appeals focused *entirely* on the question of obscenity. Thus it is unnecessary to consider whether any standard other than obscenity would suffice. But, while perhaps unnecessary to the resolution of this suit, we think it plain that, whatever the characterization of the offense under state law, obscenity requirements must be satisfied whenever the state seeks to proscribe speech because of its sexual orientation. That is surely central to the reasoning in both *California* v. *LaRue*, 409 U.S. 109 and *City of Kenosha* v. *Bruno*, 412 U.S. 507, 515, to say nothing of *Miller* v. *California*, 413 U.S. 15, *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49 and the other 1973 obscenity cases, including the remands based upon those decisions. "Under the holdings announced today, no one will be subject to prosecution for the

sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." *Miller* v. *California, supra,* at 27.[18] That obscenity criteria must be satisfied in state regulation of motion pictures is the implicit premise of countless decisions of this Court. See the cases cited and *Kaplan* v. *California,* 413 U.S. 115; *Jenkins* v. *Georgia,* 417 U.S. ___. Surely *no principled distinction can be advanced* for holding that, however modified to take into account differences among the various media, obscenity criteria must be satisfied in dealing with sexual representations in motion pictures, but they are *wholly inapplicable* with respect to live theatre performances of the same material. Speaking specifically of live theatre, the California Supreme Court, in recognizing that obscenity criteria must be satisfied, emphasized that "any more restrictive rule could annihilate in a strike much of the modern theatre and cinema. The loss to culture and to First Amendment rights would be equally tragic." *Barrows* v. *Municipal Court,* 1 Cal. 3d 821, 831.[19]

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[18] This language was quoted with approval in both *Hamling* v. *United States*, 417 U.S. ___, ___, and *Jenkins* v. *Georgia*, 417 U.S. ___, ___.

[19] The lower courts are unanimous in holding that obscenity requirements — *however refined to take account of the differences in the various media* — must be satisfied with respect to live theatre. In *P.B.I.C., Inc.* v. *Byrne*, 313 F. Supp. 757, 763-764 (D. Mass. 1970), remanded on other grounds 413 U.S. 905, a three-judge district court, in opinion by Circuit Judge Coffin, expressly so held. The court there enjoined threatened criminal prosecution of HAIR under state "lewdness" statutes which, as construed, did not require satisfaction of the obscenity requirements laid down by this Court. This decision was in accord with that of every court which has considered the problem. *Barrows* v. *Municipal Court*, supra; *People* v. *City of Newark*, 22 N.J. 472 (1954), *aff'd* 354 U.S. 931. *People* v. *Bercowitz*, 308 N.YS.2d 1 (1970).

A. *The District Court's Opinion.*

As the courts below saw the matter, the heart of the case turned on whether HAIR was obscene. The district judge empaneled an advisory jury and held an evidentiary hearing. The jury returned a verdict of obscenity (Pet. p. 37; 341 F. Supp. at 472). Not only did the jury not see the play, the question of obscenity was submitted to it in an indiscriminate manner.[20] That neither the district judge nor the court of appeals could attach controlling significance to the jury's verdict, is, of course, clear beyond doubt. A judge must make his own *independent determination* whether the speech is protected by the constitution of the United States.[21] E.g., *Miller* v. *California,* 413 U.S. 15, 28-29; *Kois* v. *Wisconsin,* 408 U.S. 229, 231-232.[22] The judge recognized this fact; after reciting the findings of the jury he proceeded to make extensive findings of his own (Pet. pp. 38-42; 341 F. Supp. at 472-74).

In finding HAIR obscene the district judge recognized that he was reaching a result contrary to every other court which has considered the matter about a play which has shown in over 140 cities (Pet. p. 41; 341 F. Supp. at 474), and which is one of the most successful and widely acclaimed theatre productions in modern times.

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[20] While it is unnecessary to consider the point here, the role of the jury in free speech cases raises substantial questions. Monaghan, *First Amendment "Due Process"*, *supra*, 83 Harv. L. Rev. at 528-29.

[21] This is part of the larger principle that where free speech claims are at stake the court must make its own independent determination. *New York Times* v. *Sullivan*, 376 U.S. 254, 284-85; *Letter Carriers* v. *Austin*, 417 U.S. ___, ___.

[22] Perhaps greater leeway exists where the question on appellate review is whether the material appeals to a prurient interest or is patently offensive, rather than whether the material has serious literary or political value. See Monaghan, *Obscenity 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 82 Yale L.J. 127, 153 n.118 and related text. Cf. *Hamling* v. *United States*, 417 U.S. ___. But even on the former issues the Court retains the ultimate power to make an independent determination of its own. *Jenkins* v. *Georgia*, 417 U.S. ___.

The judge recognized, as he must, that HAIR's brief nude scene was not decisive, for "nudity alone is not enough to make material legally obscene." *Jenkins* v. *Georgia*, 417 U.S. —, —. See also *City of Kenosha* v. *Bruno*, 412 U.S. 507, 515; *California* v. *LaRue*, 409 U.S. 109; *Kois* v. *Wisconsin*, 408 U.S. 229;[23] particularly where, as here, the nude scene is plainly not designed to appeal to "a shameful or morbid interest in nudity, sex, etc." *Roth* v. *United States*, 354 U.S. 476, 487 n. 20. Its setting is symbolic, not erotic. (App. pp. 97-98). *Cohen* v. *California*, 403 U.S. 15, 20.

The judge reached the conclusion he did because he fundamentally misunderstood the controlling constitutional standards. The crucial part of the judge's ruling, approved by the court of appeals, follows:

> "Obscenity, however, as it relates to theatrical productions, can consist of either speech or conduct or a combination of the two. *It is clear to this Court that conduct, when not in the form of symbolic speech or so closely related to speech as to be illustrative thereof, is not speech and hence such conduct does not fall within the freedom of speech guarantee of the First Amendment.* These matters were dealt with by the United States Supreme Court in the case of *United States* v. *O'Brien*, 391 U.S. 367 . . . .
>
> *"It is further clear to this Court that conduct not within the First Amendment is not subject to the*

[23] This is not a case of nudity occurring in public places as was *Nelson* v. *Iowa*, 178 N.W 2d 434, *cert. den.* 401 U.S. 923. Here the nudity occurs in a theatre, the audience is forewarned, and the nudity had dramatic relevance to the performance. *See P.B.I.C., Inc.* v. *Byrne*, *supra*, 313 F. Supp. at 764. See Harlan, J., *Manual Enterprises* v. *Day*, 370 U.S. 478, 490; *Jacobellis* v. *Ohio*, 378 U.S. 184; *Cain* v. *Kentucky*, 397 U.S. 319; *Bloss* v. *Dykeman*, 398 U.S. 278. Moreover, there is no showing that the Tennessee statutes were specifically directed at nudity.

requirement that the production in which it takes place be judged as a whole, but rather that the conduct may be judged obscene or nonobscene on the basis of individual acts of conduct. It is abundantly clear that if a crime other than the crime of obscenity were committed upon the stage, the actor committing that crime could neither claim First Amendment protection nor could he require that he be judged criminal or noncriminal on the basis of the production as a whole . . . . *Accordingly, it must be that when the crime of obscenity is committed upon the live stage by conduct and not by speech*, or symbolic speech, no First Amendment protection attaches to that conduct *and no First Amendment requirement attaches that requires the production as a whole to be reviewed in determining such criminal obscenity.*

"This Court is aware that a district judge dealt differently with this issue in the case of *Southeastern Promotions, Ltd.* v. *City of Atlanta*, D.C., 334 F.Supp. 634 (1971) cited above. The Court there held that a stage production cannot be dissected into speech and nonspeech components . . . . It is a false and dangerous doctrine that the First Amendment forbids all regulation of conduct so long as that conduct masquerades under the guise of the treatrical. This Court respectfully declines to follow the rule set forth by the district judge in the *Atlanta* case. The same fallacy attaches to each of the cases relied upon by the plaintiff in prior adjudications of the theatrical production "Hair."

"When viewed in their component parts, it is perfectly clear that the actors and actresses in the theatrical production "Hair," by their conduct, and apart from any element of speech, commit repeated acts of criminal obscenity . . . . The Municipal Auditorium is

a public place and the committing of live acts of simulated sexual intercourse, masturbation and mixed group nudity upon the stage before a live audience appeals to the prurient interest in sex, is patently offensive because it affronts contemporary community standards, both state and national, relating to the representation of sexual matters, and it is utterly without redeeming social value." (Pet. pp. 43-46; 341 F. Supp. at 475-76) (Emphasis supplied.)

The judge's distinction might, on the surface, seem to be a simple one — aimed solely at hard core pornography wrapped up in dialogue and presented as a play. Cf. *Miller* v. *California*, 413 U.S. 15, 25 n. 7. But, quite plainly, the judge meant something of a quite different order, as is apparent from his conclusion that one of the most important plays in modern times is obscene. Indeed, it seems evident that the district court's approach would eliminate from live theatre virtually every sexually oriented scene no matter how presented and how central to the plot. By the criteria used below many of the Greek classics (e.g., Lysistrata) could not be shown. See G. Norwood, *Greek Comedy*, 1-13 (1963).

B. *Live Theatre Is A Unitary Production, Artistically and Constitutionally.*

The courts below would artificially separate any play — a unitary presentation — into its constitutent words and conduct; they would then further divide "conduct" into that which is "illustrative" of the speech and that which is not — the latter then being treated as wholly beyond the first amendment. No criteria are suggested for discriminating between the two types of "conduct", but it seems apparent that what constitutes "illustrative" conduct is a very narrow species, indeed. We submit that

this judicial atomization of a unitary mode of expression discloses a total misapprehension of what both the constitutional guarantee of free speech *and* live theatre are all about.

Fundamentally, both courts below ignored the crucial point that each medium presents its own unique problems under the first and fourteenth amendments. E.g., *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684, 689-90; *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94. As Mr. Justice Jackson aptly observed, "each [medium] is a law unto itself." *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (concurring opinion). Accordingly, each medium must be taken for what it is, not treated as though it were something else. The district judge wholly ignored these considerations. Instead, he relied upon an over-simplified distinction between "speech" and "conduct," an oversimplification which has been criticized by every commentator who has considered the subject.[24] It is, moreover, an oversimplification that finds no warrant in the decisions of this Court. Those decisions, of which *Spence* v. *Washington*, 417 U.S. —, is only a recent example, recognize that every aspect of speech involves some integrally related conduct, which has necessarily been treated as a part of that speech.[25] See also *Saxbe* v. *Washington Post Co.*, 417 U.S. —, — (Powell, J.,

[24] E.g., Kalven, *The Concept of the Public Forum; Cox* v. *Louisiana*, 1965 S. Ct. Rev. 1, 23-24; Henkin, *On Drawing Lines*, 82 Harv. L. Rev. 63, 80: "If it is intended as expression, if in fact it communicates, especially if it becomes a common comprehensible form of expression, it is speech." See also Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 Sup. Ct. Rev. 6; Comment, *Symbolic Conduct*, 68 Col. L. Rev. 1091.

[25] Thus the *conduct* of wearing arm bands is protected, *Tinker* v. *Des Moines School District*, 393 U.S. 503. So too is the *conduct* of distributing leaflets protected by the first amendment. *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415, 419. Similarly, picketing and demonstrations, while they involve speech "plus" conduct are entitled to considerable protection under the first amend-

dissenting). These decisions make plain that first amendment freedoms are not to be denied by artificially breaking up essentially unitary forms of communication into "speech" and "something else". "Speech" in the constitutional sense includes a range of integrally related activities, such as leafleting, operating broadcasting facilities, associating for speech purposes, demonstrating, picketing, etc. These activities are *within* the ambit of free speech, and can be curtailed only if standard first amendment requirements are satisfied; namely, a narrowly drawn restriction designed to vindicate compelling governmental interests. That is the plain relevance of the foregoing cases, of *United States* v. *O'Brien*, on which the district judge relied, and of the obscenity decisions of this Court during the last two terms.

The judge, as we have said, also showed no understanding of the nature of live theatre. In live theatre — a form

ment. *Amalgamated Food Employees Union* v. *Logan Plaza*, 391 U.S. 308; *Gregory* v. *Chicago*, 394 U.S. 111; and *Brown* v. *Louisiana*, 383 U.S. 131; *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 99. In essence this is because it has always been understood that some conduct is an integral part of the speech itself, and the communication cannot exist without both. The unworkability of any simple distinction between speech and conduct was recognized in numerous opinions of this Court during recent terms. Thus in *Grayned* v. *Rockford*, 408 U.S. 104, and *Police Department of Chicago*, v. *Mosley*, 408 U.S. 92, the Court again recognized that picketing is within the protection of the first amendment, and both opinions referred to picketing as "expressive conduct". In *Kleindienst* v. *Mandel*, 408 U.S. 753, 764, the Court specifically rejected an attempt to resolve a first amendment issue in terms of an "action-speech" dichotomy saying "we cannot realistically say that the problem facing us disappears entirely or is non-existent because the mode of regulation bears directly on physical movement." In *Healy* v. *James*, 408 U.S. 169, 181, the Court once more observed that "speech" includes more than "speaking", again recognizing that the right embraces freedom of association even though "the freedom of association is not explicitly set out . . . ." See also *Procunier* v. *Martinez*, ___ U.S. ___. We would also invite the Court's attention to *Wisconsin* v. *Yoder*, 406 U.S. 205, the Amish School case, where the Court refused to analyze a freedom of religion claim in terms of a facile distinction between beliefs and "conduct."

of communication which antedates the first amendment by thousands of years — there is an inseparable union of words and action, which *together* serve as a vehicle for conveying ideas. That live theatre involves an inseperable union of words and action was clearly understood 2,300 years ago by Aristotle in his influential *Poetics*, see Book 1, Ch. 6, and a contrary view would certainly startle those involved with that art form. E.g., Shank, *The Art of Dramatic Art* (Delta 1969), particularly ch. 4; *The Theory of the Modern Stage*, E. Bentley, ed., (Pelican 1968). This union has never been understood to be "mainly conduct and little speech." *Cohen* v. *California*, 403 U.S. 15, 27 (dissenting opinion). To the contrary, it has always had "a recognizable communicative aspect [which is] beyond dispute." *Cowgill* v. *California*, 396 U.S. 371 (memorandum of Harlan, J.). And, as Judge Edenfield observed, "The nonverbal elements in a theatrical production are the very ones which distinguish this form of art from literature." *Southeastern Promotions, Ltd. v. Atlanta*, 334 F. Supp. 634, 639. A play's "conduct", therefore, is not "separately identifiable conduct which allegedly was intended by [petitioner] to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message." *Cohen* v. *California*, 403 U.S. 15, 18.[26] A play is, we submit, *the* classic form of "expressive conduct". *Grayned* v. *City of Rockland*, 408 U.S. 104, 120; *Spence* v. *Washington*, 417 U.S. —, —.

HAIR, it should be noted, represents an important illustration of contemporary theatre's efforts at restructuring the age old relationship between words and con-

[26] A play is therefore, not simply "conduct without substantial communicative intent and import". White, J., concurring in *Smith* v. *Gougen*, ___ U.S. ___. The "nature of the activity combined with the factual context and environment" (*Spence* v. *Washington*, 417 U.S. ___, ___) make that clear.

duct in live theatre.[27] But that matter need not be pursued here. The crucial point is that it is neither good theatre nor good first amendment doctrine arbtirarily to severe a unitary production into the artifical categories of speech and conduct. If motion picture theatre productions are constitutionally entitled to the protection of the obscenity standard, no sufficiently principled justification can be advanced for holding these standards *wholly inapplicable* to a live theatre performance *of the same matter*. Accordingly, the non-speech aspects of the theatre (if any) can be regulated only upon a showing of "a sufficiently important governmental interest" (*United States* v. *O'Brien*, 391 U.S. 367, 376) which, in the context of the regulation of sex, requires specifically framed prohibitions satisfying obscenity criteria. *Miller* v. *California*, 413 U.S. 15, 25-26. See *P.B.I.C., Inc.* v. *Byrne, supra; Oklahoma City, supra*, 459 F.2d at 283-84. (See also, pp. 37-39, *infra*, on the distinction, ignored by the judge, between murder and simulated sexual acts on stage.)

The courts below were, therefore, plainly wrong. And once the complex and artificial distinctions invoked by the courts below are rejected, no basis exists for assuming that the Tennessee obscenity statutes satisfy the specificity requirements of *Miller* v. *California, supra*, at 25-26. Ten

[27] As Norris Houghton observed, HAIR is prototypical of more than modern plays dealing with social protest; it is an important illustration of the artistic changes occurring in contemporary theatre. Houghton, *The Exploding Stage*, 201-205, 211, 232 (Weybright & Talley, N.Y.). So far as pertinent here, HAIR is a classic illustration of contemporary theatre's "war on words" (p. 204), one of which "presupposes nonverbal artistic expression that is contemporary, a system of movement that conveys, almost as a dance can do, the theatrical intent." (p. 206) This is not "suppressing speech . . . but of changing its role . . . (p. 205). The overall purpose of this and other artistic changes is to achieve "a new relationship with the spectator" (p. 203).

days after this petition for certiorari was granted, the supreme court of Tennessee, in fact, expressly held that the state obscenity statutes conflicted with *Miller's* specificity requirements. *Art Theatre Guild, Inc.* v. *State*, — Tenn. —, 14 Cr. L. R. 2498. Tennessee has enacted legislation to rectify the defect. Chapter 510 of the Public Acts of 1974. But that matter need not be pursued further here: the critical issue is not the specificity *vel non* of the Tennessee statutes, but whether the lower courts correctly understood the constitutional standards applicable to *any* state obscenity statute as it applies to live theatre—however "specific" the statute. Put differently, *Miller* v. *California, supra*, did two things: *Miller* modified *Roth's* definition of obscenity; it *also* required that the state statutes be specific. (413 U.S. at 24-26.) Whether the new legislation cures the latter defect is not at issue here. The point is that the lower courts simply misunderstood the relevance of *Miller*, in the context of live theatre. And no matter what Tennessee statute is passed, that will always be the case so long as the court of appeals relies upon its "speech-conduct" criteria set forth in this case. We emphasize, therefore, that a remand is not appropriate in this case: the defect complained of here is not in the Tennessee laws but in the court of appeals' understanding of the constitutional principles laid down by this Court.

C. *The Standards of the Street Are Not Applicable to the Theatre.*

Without seeing the play, the judge found the "conduct" in HAIR obscene because not "illustrative of the speech" because, he said the simulated sexual conduct was "unrelated to" (Pet. p. 40) or "without reference to (Pet. p. 41) any *dialogue*." (341 F.Supp. at 474) That conclusion, incredible on its face and wholly without any accept-

able basis in this record, is most revealing: the judge does not find that the simulated sexual conduct is not relevant to the *play*, simply to the dialogue. It seems apparent to us that the judge assumes that the play and dialogue are one, thereby missing the whole idea of what live theatre is all about.[28]

Moreover, even if the conduct were "unrelated" to the "dialogue" why was that conduct "obscene"? The fact that there is a brief nude scene at the end of the first act is certainly not enough, as the district judge recognized, particularly since that scene was *not* erotically oriented. (App. pp. 97-98) The judge seemed rather to have focused on "simulated sexual conduct." (Pet. p. 40; 341 F. Supp. at 474) Emphasis should be placed upon *simulated*. The judge does not find that there was any actual masturbation, sodomy or oral copulation; he finds simply that it was "simulated." The judge does not find that this "conduct" has no relation to the play, or that, *in that context*, it was hard core pornography.

We think it plain that the judge found the conduct obscene because he simply assumed that the standards of the street are applicable to the theatre. So too do respondents, as is apparent from their misplaced reliance in the court of appeals upon the following language in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 67:

> "Conduct or depictions of conduct that the state police power can prohibit on a public street do not become *automatically* protected by the Constitution merely because the conduct is moved to a bar or a *'live' theatre stage*, any more than a 'live' performance of a man and woman locked in sexual embrace

[28] His view stands in sharp contrast to *Kois* v. *Wisconsin*, 408 U.S. 229, 231, where nude pictures in a newspaper were held protected because "they are relevant to the theme of the article." See also note 27, page 36, *supra*.

> at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue."

But surely this language is torn wholly from context. The Court was not addressing itself to the standards to be applied to live theatre; it was simply rejecting an extreme view that "anything goes" simply because it occurs on a stage.

We recognize, of course, that states "have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." *Miller* v. *California*, 413 U.S. 15, 26 n. 8. But that observation does not end the inquiry. This Court has repeatedly recognized that a "reviewing court must, of necessity, look at the context of the material, as well as its content." *Kois* v. *Wisconsin*, 408 U.S. 229, 231. "First Amendment guarantees must be 'applied in light of the special characteristics of the . . . environment' " *Procunier* v. *Martinez*, ___ U.S. —, —. *Spence* v. *Washington*, 417 U.S. —, —. That words, pictures or action occur in the theatre as part of a serious theatrical work rather than on the street is, therefore, relevant. And

> " '[A]cts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene.' "

Barrows v. *Municipal Court*, 1 Cal. 3rd 821, 830. This Court's pronouncement in *California* v. *LaRue*, 409 U.S. 109, 116-118, expressly recognizes those facts in holding that conduct in a public barroom is not to be equated with "conduct" occurring in the context of a theatre performance, as Judge McCree rightly pointed out in his

dissent in the court of appeals (Pet. p. 67; 486 F.2d at 899-900). Were the result otherwise, the loss of free speech values would be considerable. As Judge Coffin wrote in *P.B.I.C., Inc.* v. *Byrne, supra,* 313 F. Supp. at 764-65: "We cannot escape the conclusion that to apply the standards of the street and market place to the world behind the footlights would be to sanction a censorship dragnet of unconstitutional proportions."

In determining whether a play is obscene the same general standards as would apply with respect to its movie counterpart must be applied. *Kaplan* v. *California,* 413 U.S. 115, 119.[29] We recognize, however, that each medium presents its own special problems which, in turn, may require somewhat different accommodations. It is, as we have said, possible that even if a written description of conduct might not be obscene, a statute *specifically* proscribing a presentation of that conduct occurring in the context of a motion picture or play might be valid: if the particular conduct is patently offensive and so lacking in relevance and communicative value that it could constitute hard core pornography. *Miller* v. *California, supra* at 25-26. Issues of that character need not be resolved here, however, since the courts below did not approach the problem in that manner.

But in this regard we would observe that in evaluating the sexual content of a play, one should not assume, *a priori,* that more stringent requirements can be imposed on live theatre than on movie depictions of the same matter. The reverse may, in fact, be nearer to the truth. As Judge Coffin observed, such "factors as pose, lighting, angle of audience vision, mobility and dramatic context" have importance. *P.B.I.C., Inc.* v. *Byrne, supra,* 313 F. Supp. at 764. The magnification of conduct and the

[29] "The Court has applied similarly conceived First Amendment standards to moving pictures, to photographs, and to words in books."

resulting clarity with which it may be seen on a large screen may emphasize and distort sexual activity far more than could be done on a distant, dimly lighted stage. Accordingly, while the state concededly possesses power to punish either actual or simulated sexual conduct occurring on a public street, the distinction between the two may be of considerable constitutional moment in the context of the movies or live theatre. Simulation of life is, after all, a good deal of what those media are about. By contrast, actual, instead of simulated, murder would far transcend the speech expectations of any theatre audience — which expects that all the players will be around for the curtain call. Actual murders, actual use of narcotics, etc., simply do *not* constitute "a common comprehensible form of expression" to the theatre audience, Henkin, *supra,* page 32, note 19.[30] See *Spence* v. *Washington,* 417 U.S. —, —.

D. *The Obscenity of HAIR's Language.*

The foregoing observations dispose of Judge O'Sullivan's unexplained finding that the language of HAIR is obscene *per se* (Pet. p. 62; 486 F.2d at 897). In this respect the court of appeals, it should be noted, went considerably beyond the district court. The district judge made detailed findings concerning HAIR's "street language," but he recognized (Pet. p. 43; 341 F. Supp. at 475) that this was not decisive under the decisions of this Court. *Cohen* v. *California,* 403 U.S. 15; *Gooding* v. *Wilson,* 405 U.S. 518; *Hess* v. *Indiana,* 414 U.S. 105; and *Lewis* v. *New Orleans,* 415 U.S. —. These cases have an *a fortiori* pertinence here because the play's dialogue

[30] Moreover, even if this conduct were also characterized as "symbolic speech" "compelling state interests" would support state prohibition of the conduct mentioned. *United States* v. *O'Brien, supra.*

is, of course, not arguably within any "fighting words" exception. *Hess* v. *Indiana, supra,* at 107-08.

Judge O'Sullivan's "finding" is without any support in the record. Fundamentally, Judge O'Sullivan simply confuses obscene speech with so-called "offensive" speech. *Jacobs* v. *Board of School Commissioners,* 490 F.2d 601, 609-610 (7 Cir. 1973), *certiorari granted,* 417 U.S. —. This is, of course, plain error. "[O]bscene expression . . . must be, in some significant way, erotic." *Cohen* v. *California, supra,* at 20; *Papish* v. *Board of Curators of University of Missouri,* 410 U.S. 667, 670; *Miller* v. *California,* 413 U.S. 15, 18-19 n.2 HAIR's speech may shock, but there is no demonstration that its dominant theme is erotic. Once Judge O'Sullivan's erroneous characterization is laid bare, it is a sufficient answer to his argument to observe that there is no narrowly drawn Tennessee statute which purports to proscribe HAIR's "offensive" speech.

But we would make an additional response. With deference to those members of this Court who apparently believe otherwise, it seems to us far too late in the day to permit censorship solely designed to police the elegance of language. "Vulgar" language is the method by which many groups in our society communicate in whole or in part. Surely subcultures are entitled to communicate in the form which they find relevant. Note 53 B.U. L. Rev. 834, 853-57.[31] *Cohen* and its progeny are right in that insight.[32]

[31] Moreover, it would be an error to overlook the danger to dissident groups if censorship of offensive speech is permitted. "Offensive words are most often used in public by members of groups whose divergence from the traditional American life style includes social, political, philosophical, cultural, and linguistic differences. It is not coincidental that the litigants in *Cohen*, *Gooding*, *Rosenfeld*, *Lewis*, *Brown*, and *Papish* were all members of such groups. To allow enforcing authorities who are often the object of this offensive language to suppress it simply because partisans of the dominant life style find it distasteful is to censor the vital ideological and emotional content of dissidents' expression. The discretionary power of the police to make selective arrests makes acute the danger that politics will motivate the exercise of that power. The Court has wisely stressed the avoidance of such abuse." *Rutzick, Offensive Language and The Evolution of First Amendment Protection,* 9 Harv. Civil Rights and Civil Liberties, 1, 28.

[32] In any event, considerations of institutional stability require that those cases be followed unless the bar is to assume that *stare decisis* has absolutely no role in constitutional adjudication.

In any event, and more to the point here, *this communication takes place in a theatre, not on the streets,* a fact totally ignored by Judge O'Sullivan. The audience is forewarned so that there is no attempt to thrust this language upon an unwilling audience. Here, there is "no evidence to indicate that [the] speech amounted to a public nuisance in that privacy interests were being invaded . . . in an essentially intolerable manner." *Hess* v. *Indiana, supra* at 108. To hold, therefore, that this language by itself is sufficient to withdraw protection of the first amendment is to deny that the live theatre can depict the manner and expression of a sizable subculture of the United States population. The statement carries its own refutation. We think it apparent that here the language "considering [its] content and its placement", at the minimum, "bears some of the earmarks of an attempt at serious art." *Kois* v. *Wisconsin,* 408 U.S. 229, 231.

Point IV. The Record Does Not Support a Finding that HAIR Is Obscene.

A. *Respondents Have Failed To Meet Their Burden of Proof.*

Respondents rightly concede[33] that the burden of proof on obscenity rests with them. *Blount* v. *Rizzi,* 400 U.S. 410, 417; *Healy* v. *James,* 408 U.S. 169, 184. Unless one concludes that it is self-demonstrating from the libretto

[33] Tr. Vol. 2, p. 5.

alone that HAIR is hard core obscenity then, *on respondents' evidence alone*, the courts should have held that, as a matter of law, respondents have not met the burden of proof.

Respondents' case consisted of the testimony of four witnesses. The first, Mr. Steve Conrad, is Commissioner of Public Utilities, Grounds and Buildings. Apart from reading the libretto into the record, Mr. Conrad's testimony was, to say the best, marginal. He readily conceded that he had absolutely no expertise in the theatre (App. p. 54), missed many of the lyrics (App. p. 55) and that his own personal ideas and opinions were at stake. (App. p. 54) Even he, however, recognized that the play had a message (e.g., App. p. 55).

Respondents next witness was Mr. William Trasher (App. p. 57) a Chattanooga attorney. He had seen the play 1½ years before and had walked out at the end of the first act. (Indeed, he was unsure as to how many acts the play had, App. p. 59.) He too readily admitted his lack of knowledge about the theatre: "I could tell you about baseball and football but I don't know much about the theatre" (App. p. 60). His reason for leaving the theatre is simply stated at App. p. 59. He was "revolted" by the "blasphemy and sacrilegious attitude" of the play, its "desecration of the American flag" and its "belittlement of the United States Government" which means, of course, that he understood and rejected what he perceived to be HAIR's message.

The third witness was a medical doctor, John Ellis (App. p. 61), who saw the play in England. He testified that it offended his sense of decency (App. pp. 62-63). Rather grudgingly, he conceded that the play had a message, i.e., "ignore what your parents say, ignore what the school says, ignore the church and come live in the street with us." (App. p. 63).

The final witness for the respondents was Mr. Rickets, a life insurance underwriter who was a member of the auditorium board. He too conceded that the play had a message (App. pp. 64-78). His testimony has an interesting twist to it. He expressly disclaimed any expertise in the theatre and said that he was testifying as an "average citizen in Chattanooga" (App. pp. 76-77). But he had some above average experience. He was in the United States Marshall's Office for 16½ years. While there, he said "we confiscated many films and I have seen them there", apparently wholly on his own initiative (App. p. 77).

Apart from the libretto itself, this slender evidence constituted respondents' case on obscenity. Can it be seriously asserted that this evidence provides a sufficient basis for concluding that a theatre performance which has played in over 140 cities in the United States and has been widely acclaimed, can be suppressed in *Chattanooga*? All that is involved here is the testimony of witnesses who have not the slightest basis for giving "expert" opinion on any material issue. Not one of respondents' witnesses testified, or could testify, with respect to what are contemporary community standards (national or local) as to what is acceptable not for the city streets but *for live theatre*. See *United States* v. *Klaw*, 350 F.2d 155, 166-67, 170 (no evidence in record of prurient appeal). *Jenkins* v. *Georgia*, 417 U.S. —, —. Moreover, each of the witnesses grudgingly conceded that the play communicated ideas.

It would reduce the free speech guarantee to a nullity if respondents' testimony were adequate to support the finding that the play was obscene. All that is shown here is opposition to HAIR and what it stands for. But access to a municipal auditorium "may not be refused to a production because it is not the type of entertainment which appeals

to the auditorium board." *City of Mobile, supra,* 457 F.2d at 341. It is in fact, outrageous in the extreme to think that American citizens in New York, Los Angeles, Chicago, San Francisco, Seattle, Las Vegas, Boston, *Memphis* and *Nashville,* not to mention citizens in virtually every major capital of the Western world as well as Tokyo, Sydney, and Tel Aviv can see this important play but that these respondents can decide that the citizens in Chattanooga and its surrounding area cannot see it in a municipal auditorium. Petitioner submits that the constitution of the United States prohibits such gross censorship; it prohibits this effort to reduce the residents of Chattanooga to the status of second class citizenship.

Wholly apart from the affirmative evidence in support of HAIR,[34] therefore, it is plain that there is no acceptable basis in this record for concluding that HAIR is obscene.

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[34] While the Court has the power to canvass the record and make its own determinaiton on HAIR's protected character (see page 29, *supra*), we recognize that the Court may decide to leave to the lower court initial determination of HAIR's obscenity *vel non* once the correct standards are articulated. We summarize here, however, the evidence in favor of the play should the Court decide to resolve the matter for itself. There was substantial evidence in the record that HAIR satisfied none, let alone all, of the elements which must be present if a finding of obscenity is to be sustained.

Specifically:

1. *Appeal to Prurient Interest.*

The dominant theme of HAIR, taken as a whole, does not appeal to a prurient sexual interest. The "dominant theme" of HAIR is not sex, nudity, or anything of that nature. HAIR is concerned with the world of the alienated young—with Vietnam, racism, drugs, love, etc. (App. pp. 79-96) The nude scene is plainly not designed to "appeal to a shameful or morbid interest in nudity, sex, etc." *Roth* v. *United States*, 354 U.S. 476, 487 n.20; *Cohen* v. *California*, 403 U.S. 15, 20. Its setting is symbolic, not erotic. (App. pp. 97-98)

2. *Patent Offensiveness.*

HAIR is not "patently offensive"; it does not affront contemporary community standards relating to the description or representation of sexual matters *in the live theatre.* (App. pp. 90-91)

B. *The Judge Erred in Not Seeing the Play.*

That this record is insufficient to support a finding of obscenity is apparent for another reason. In this case both the district judge and the panel of the court of appeals ruled that HAIR was obscene without even viewing it, and despite substantial record evidence of the play's protected character. This was plain error. Surely *on this record* the courts below were bound by the record evidence in favor of the play.

Paris Adult Theatre v. *Slaton,* 413 U.S. 49, 56, does not point to a different result. To be sure, the Court there held that the judge was not bound by the expert opinion evidence in favor of the movie. But in *Slaton* the state court had viewed the challenged material. (See *Kaplan* v. *California,* 413 U.S. 115, 121) Moreover, the materials at issue were "hard core pornography [which] can and does speak for itself." (413 at 56 n. 6; *id.* at 51-52.) See also *Kaplan* v. *California, supra,* 413 U.S. at 116-117. Here, by contrast, all the courts below had before them were the libretto and, as we have said, respondents' patently weak testimony. The district court "findings" were, therefore, made in the dark.

Unless the unprotected character of the material is self-demonstrating, we know of no decision which would au-

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The use of four letter words can hardly be thought to deprive the speech of its protected character, as the judge recognized. See p. ___ supra. Moreover, these very words are used in the phonograph album which has sold almost countless copies in every city and town throughout this country. In addition, HAIR has played in innumerable other American and foreign cities (App. pp. 106-107), a fact not to be ignored in determining whether it is patently offensive for live theatre.

3. *Serious Value.*

Defendants could not rationally allege that HAIR is "without serious literary, political and artistic value." *Miller* v. *California,* 413 U.S. 15, 26. The widespread critical acclaim received by HAIR throughout the country demonstrates that fact. In *Southwest Produc-*

thorize a court to disregard totally the evidence of non-obscenity. E.g., *Attorney General* v. *A Book Named "Naked Lunch"*, 351 Mass. 298, 299 (1966) ["Although we are not bound by the opinions of others concerning the book, we cannot ignore the serious acceptance of it by so many persons in the literary community"]. *United States* v. *Klaw*, 350 F.2d 155, 170 [It "is the record and not our feelings that must control"]. Monaghan, *Obscenity 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 Yale L. J. 127, 150-51 and note 115. There was substantial record evidence demonstrating that HAIR is a serious and widely acclaimed art work — to say nothing of the patently weak testimony that the play is obscene. Here the courts below disregarded favorable evidence without even seeing the play, and without a finding that it was impractical to do so.[35]

tions, Inc. v. *Freeman*, (D. Ark. 1970) at page 7, Judge Eisel characterized the matter as follows:

> "The principal characters in the production are definitely not from the 'straight' world. Rather they are a collection of the disenchanted, the dropouts from conventional society: the young, the poor and the black, experimenting with new life styles, and yet still trying to confront established society on what they believe to be the 'real' issues: war, poverty, racism and the hypocrisy of their elders. Their language is from the street and of their generation. Whether what is said has any merit or validity or, indeed, whether it is said well is irrelevant for our purposes. That the play, taken as a whole, does make statements relating to important social, moral and political issues is, however most relevant under the tests mandated by the decisions of our courts."

There was ample testimony in this record to support Judge Eisel's characterization. (App. pp. 79-110) Even the defense witnesses conceded this fact, as we have shown.

[35] The necessity for viewing the play, at least absent the showing that such procedure is not practically available, is not obviated by the judge's footnote (Pet. p. 42; 341 F. Supp. at 474 n.4) that the play is "substantially modified from time to time and place to place". If that is so, it is difficult to comprehend what in this record supports *any* of the judge's findings since all the oral testimony was based on exhibition of the play elsewhere. Moreover, we are not told

We need not determine whether a judge could act to issue a warrant or deny interim relief on the record made in this case. Here the judge entered a *final* decision on the merits after a trial without making any effort at seeing the play. Respondents flew to see HAIR on the eve of the trial. (App. p. 56) While the burden of expense would seem to follow the burden of proof, the judge never inquired whether petitioner would bear the expense of his travel. The judge should have done so.[36] The alternatives which do least damage to the free speech interest must, of course, be utilized where reasonably available. E.g., *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 101 n. 8 (collecting cases). If for any reason it were not practicable for the judge to see the play, a separate issue would of course be presented, but here there is no such showing of impracticability. The reason that the judge never considered seeing the play seems apparent: he believed that the play's libretto plus respondents' testimony and his view of the appropriate criteria for determining the obscenity issue were all that he needed. That was plain error.

how HAIR "changes" in any way *material* to the issue before the judge. Surely, the fact that there is considerable "action" in the play does not mean that there is any material change in detail. Like any play, HAIR has an integrated theme and any changes from performance to performance, if they exist at all, are simply in its nuances. That the judge felt able to make findings about the "obscene conduct" in HAIR is a recognition of this fact. Finally, the judge's finding of "changes" is contrary to the *express stipulation between the parties*. (App. pp. 31-32). Not surprisingly, neither the respondents nor the court of appeals made mention of this below.

[36] In *Southeastern Promotions, Ltd.* v. *Cervantes*, No. 26463-F, a state court judge in St. Louis flew to Kansas City to see a production of the play and after so doing ruled in its favor.

Conclusion

The judgment should be reversed.

Respectfully submitted,

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